No.

IN THE

Supreme Court of the United States

October Term, 1975

CHARLES COLES DIGGS, *et al.*,
Petitioners,

v.

CIVIL AERONAUTICS BOARD
and
SOUTH AFRICAN AIRWAYS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, Charles Coles Diggs, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on August 4, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F.2d 1248. The Court's opinion is reproduced in the Appendix hereto at 1a, 3a. The Civil Aeronautics Board decided the case on September 5, 1973. The Board's decision, Order 73-10-2, is reproduced in the Appendix at 4a, 31a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit has jurisdiction under Sec. 1006 (a) of the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1486(a), to review allegations that actions of the Civil Aeronautics Board in respect to a foreign air carrier permit application approved by the President exceeded the Board's statutory authority and violated petitioners' constitutional rights?

STATUTE INVOLVED

The statutory provisions involved are Secs. 402(a) and (b), 404(b), 801 and 1006(a) of the Federal Aviation Act, 49 U.S.C. Secs. 1372(a) and (b), 1374(b), 1461 and 1486 (a), which provide as follows:

Section 402(a) and (b), 49 U.S.C. Sec. 1372(a) and (b) (1970):

> "(a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.
>
> "(b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest."

Section 404(b), 49 U.S.C. Sec. 1374(b) (1970):

> "(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 801, 49 U.S.C. Sec. 1461 (1970):

> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be trans-

mitted to the President by the Board before hearings thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof."

Section 1006(a), 49 U.S.C. Sec. 1486(a) (1970):

"Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

STATEMENT

On November 21, 1972, South African Airways (hereinafter SAA) filed with the Civil Aeronautics Board (hereinafter CAB) an application for an amended foreign air permit authorizing it to serve a new route between Johannesburg, South Africa and New York. Petitioners in this case[1] filed a request to appear as Joint Intervenors in the

[1] Petitioners include fifteen black members of the United States House of Representatives (Charles Coles Diggs, Yvonne B. Burke, Shirley Anita Chisholm, William Lacy Clay, John Conyers, Ronald V. Dellums, (continued)

Board proceedings. This request was granted on February 26, 1973.

At a prehearing conference held on February 22, 1973, petitioners requested, *inter alia*, information regarding possible discriminatory policies of SAA directed at black Americans traveling on SAA continuation flights in South Africa bookable in the United States and at SAA facilities in South Africa. Upon the denial of these requests by the Administrative Law Judge, petitioners noted their objections and requested leave to appeal to the Board. Specifically, petitioners maintained that the Board had a statutory duty under the Federal Aviation Act, Secs. 402(a) and (b) and 404(b), 49 U.S.C. Secs. 1372(a) and (b) and 1374(b), to inquire into possible discrimination against black Americans in foreign air transportation. Petitioners' request for leave to appeal was denied.

The hearing before the Administrative Law Judge was held on April 9, 1973. The petitioners participated in this proceeding and repeated their requests for evidence made at the prehearing conference. Despite the rejection of these requests, SAA subsequently presented testimony at the hearing from its Deputy Commercial Director, Frans J. Swarts, concerning the absence of discrimination or segregation on internal SAA flights or in the treatment

[1] (continued)
Walter E. Fauntroy, Augustus F. Hawkins, Barbara Jordan, Ralph Harold Metcalfe, Parren James Mitchell, Robert N.C. Nix, Charles B. Rangel, Louis Stokes, Andrew Young) and four organizations, the American Committee on Africa, the Black United Front of Washington, D.C., the African Heritage Studies Association, and IFCO-Action, with particular concerns about possible United States involvement in policies of racial discrimination affecting American citizens.

of black Americans at SAA domestic facilities. Petitioners' requests to introduce rebuttal testimony on these points were denied.

The Administrative Law Judge's recommended decision issued on May 21, 1973, endorsed the grant of SAA's application and made findings of non-discrimination as to SAA internal flights and facilities. Specifically, the decision stated:

> "No facilities at Johannesburg International Airport are segregated on the basis of race, and no facilities at the adjacent domestic airport are restricted racially as to citizens of the United States or citizens of countries other than South Africa. . . . The carrier's witness testified that . . . there is no racial discrimination on any of SAA's domestic flights within South Africa."
>
> (Recommended Decision of Administrative Law Judge Ross I. Newmann, App. 20a).

On May 31, 1973, the petitioners filed exceptions to the Administrative Law Judge's recommended decision. On June 27, 1973, the petitioners filed a brief with the Board, opposing the Administrative Law Judge's recommended decision, emphasizing that they had been denied the opportunity to present evidence on the racial discrimination issue, and requesting oral argument before the Board. Without notice to petitioners, the Board denied their oral argument request, adopted a recommended decision and order dated September 5, 1973, that would grant SAA's application, and forwarded that recommended opinion to the President for his signature.

The opinion of the Board, which was transmitted to the President, adopted the findings, conclusions and

recommendations of the Administrative Law Judge, (App. 6a), including the finding that there was an absence of discrimination against Americans on SAA internal flights or at SAA facilities in South Africa.

> "As the record indicates, the applicant does not discriminate on the basis of race on any of its international flights (SAA Exhibit 10, Tr. 30) and it makes its facilities and accessorial services available on a non-discriminatory basis. There is no racial segregation, for example, with regard to the ground services provided by the carrier between the airport and downtown Johannesburg." (App. 7a).

Having noted these findings regarding SAA's practices which petitioners had repeatedly contested, the Board ruled that it would not exercise its authority to inquire further into possible discrimination against black Americans on SAA's continuation flights or at facilities in South Africa since,

> "[s]uch evaluation would necessarily inject the Board into the complex and delicate diplomatic questions affecting relations between the United States and a friendly foreign nation." (App. 8a).

Thus, the record upon which the President based his decision in this case included findings of non-discrimination which petitioners had repeatedly been denied the opportunity to rebut. The President signed the Board's recommended order on September 28, 1973. Petitioners were served with a copy of the Board's opinion on October 3, 1973.

Upon petitioners' timely filing of a petition for review with the United States Court of Appeals for the District of Columbia Circuit on November 30, 1973, SAA intervened in these proceedings and moved to dismiss on the basis of Sec. 1006. A decision on this motion was deferred by the Court pending briefing on the merits and oral argument. After oral argument on April 3, 1975, a decision dismissing the petition on jurisdictional grounds was issued on August 4, 1975. The principal basis of this decision was the Court's belief that the language of Sec. 1006 precluded review by the Court of allegations of Board misconduct or constitutional violations when an order with respect to a foreign air carrier subject to Presidential approval was at issue.

REASONS FOR GRANTING THE WRIT

The issue presented by this case is to what extent judicial review in the courts of appeals is forclosed by the Civil Aeronautics Act of 1938. A number of developments suggest the need for a thorough re-examination of this question. These developments include: (1) a succession of conflicting circuit and district court decisions interpreting the *Waterman* doctrine;[2] (2) an expressed Congressional intent that the decision when to review Board action subject to Presidential approval rests exclusively with the several courts of appeals; (3) the redefinition of standards of justiciability in *Baker* v. *Carr*, 369 U.S. 186 (1962) and its progeny; and (4) considerations of sound judicial management and statutory interpretation. Petitioners address each of these considerations *seriatim*.

---

[2] *See* Chicago & Southern Airlines, Inc. v. Waterman Steamship Co., 333 U.S. 103 (1948).

I

An appreciation of the contradictory and confusing state of the law applicable to the review of final CAB orders concerning foreign carriers subject to Presidential approval must begin with an understanding of the Court's decision in the *Waterman* case. *Waterman*, which represents the sole statement by the Court to date on this question, held in a 5 to 4 decision that orders in respect to overseas and foreign air transportation subject to Presidential approval are not susceptible to judicial review in the courts of appeals. In reaching this result, the Court reasoned that such orders, regardless of whether they involve United States or foreign carriers, necessarily entail important political considerations and the exercise of Presidential discretion. Both in its legal analysis and its citation of authorities, the Court appeared to be strongly influenced by prevailing judicial attitudes on the foreign affairs and political question doctrines. As the majority opinion states:

> "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry. Coleman v. Miller, 307 U.S. 433,

454; United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 319-321; Oetjen v. Central Leather Co. 246 U.S. 297, 302." 333 U.S., *supra* at 111, 112.

In his dissenting opinion on behalf of four members of the Court, Mr. Justice Douglas, in language particularly relevant to the instant case, noted the implications of denying judicial review of unauthorized Board action:

> "Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus, the purpose of Congress is frustrated." *Id.* at 117, 118.

The dissent reasoned that Board action beyond the scope of its authority simply does not produce a valid order upon which the President can act, and consequently, allegations of Board action beyond its powers or in violation of the Constitution should be reviewed irrespective of purported Presidential ratification. Although the minority in *Waterman* acknowledged that the case before it dealt with Sec. 801 of the Act and thus did not involve the literal language of Sec. 1006, the logical thrust of the opinion bears equal relevance to foreign carriers as to domestic airlines.

While cases decided shortly after *Waterman* tended to accept the broad prohibitions on review which had been

enunciated in the majority opinion,[3] later cases have adopted the position that judicial review of unauthorized Board action which may threaten constitutional interests is subject to judicial review despite Presidential approval of the order in question. See *Pan American World Airways, Inc.* v. *CAB*, 380 F.2d 770 (2d Cir. 1967), *aff'd by an equally divided Court, World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968); *American Airlines, Inc.* v. *CAB*, 348 F.2d 349 (D.C. Cir. 1965); *Alaska Airlines, Inc.* v. *Pan American World Airways, Inc.*, 321 F.2d 394 (D.C. Cir. 1963).

As the Court of Appeals in the opinion below noted, each of these cases dealt with domestic carriers not subject to the literal language of Sec. 1006. Nevertheless, it is essential to recognize that in none of these decisions did the courts believe it necessary to distinguish their fact situations from those covered by the language of Sec. 1006. For example, Judge, now Chief Justice, Burger writing in the case of *American Airlines* v. *CAB, supra,* concluded, in language which appears as applicable to foreign as to domestic carriers, that:

> "The question immediately before us is whether the *Waterman* principle governs a situation in which a petitioner claims that awards made by the Board, with Presidential approval, exceed the Board's *power* under the act. Stated in another way, does *Waterman* govern a situation where the action of the Board, before the matter reaches the President, is beyond the Board's power to act?

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[3] *See, e.g.*, United States Overseas Airlines, Inc. v. CAB, 222 F.2d 303 (D.C. Cir. 1955).

> We think not, for in the latter situation there is nothing legally to submit to the President. Clearly *Waterman* presupposes lawfully exercised congressional authority in the Board's action, in the first instance, as an indispensible predicate, without which there is nothing Presidental action can approve." [footnote omitted] 348 F.2d, *supra* at 352.

The *American Airlines* decision went on to review the merits of the allegations of unauthorized Board action. Most importantly, the decision found it unnecessary to distinguish *British Overseas Airways Corp.* v. *CAB*, 304 F.2d 952 (D.C.Cir. 1962), an earlier case in which the Court stated that foreign air carrier permits subject to Presidential approval could not be subjected to judicial review in the courts of appeals. 304 F.2d, *supra* at 952, 953. Rather than distinguish *BOAC* from the *American Airlines* situation, Judge Burger concluded:

> "[S]o far as it may be thought applicable to the instant case our somewhat cryptic observation as to the unavailability of judicial review 'now or later' in *British Overseas Airways Corp.* v. *CAB* . . . is dictum." *American Airlines* v. *CAB, supra,* 348 F.2d, at 352.

A similar result was reached by the Second Circuit Court of Appeals in the case of *Pan American World Airways, Inc.* v. *CAB, supra.* Writing for the Court, Judge Hays found it unnecessary to draw any distinction between foreign and domestic carriers in determining that acts beyond the Board's authority were subject to judicial review in the courts of appeals regardless of Presidential approval. The Court reasoned (380 F.2d at 775):

> "We need not decide whether . . . the *Waterman* decision rests on a misinterpretation of § 1006 of the Act . . . providing for judicial review of the Board's orders . . . . We agree with the Court of Appeals for the District of Columbia Circuit that the *Waterman* case does not 'govern a situation where the action of the Board, before the matter reaches the President, is beyond the Board's power to act.' American Airlines v. Civil Aeronautics Board, supra, 348 F.2d at 352."

Despite the strong indication in these cases that judicial review in the courts of appeals would be possible in all future cases of unauthorized Board action, subsequent decisions have appeared to retreat substantially from this view. In *Pan American World Airways, Inc.* v. *CAB*, 392 F.2d 483, 494 (D.C.Cir. 1968), for example, the Court, in obiter dictum, suggests, not only that Sec. 1006 would bar review by courts of appeals of foreign carrier permits subject to Presidential approval, but also that review in such circumstances might be difficult to obtain before district courts as well.

The three most recent decisions on this question prior to the instant case, *Dan-Air Services, Ltd.* v. *CAB*, 475 F.2d 408 (D.C. Cir. 1973); *Overseas National Airways, Inc. v. CAB*, 426 F.2d 725 (2nd Cir. 1970); and *CAB v. Donaldson Line (Air Services), Ltd.*, 343 F. Supp. 1059 (S.D. N.Y. 1972) have all followed the suggestion made by Judge Wright in his 1968 *Pan American* decision. One of these more recent cases, *CAB* v. *Donaldson Line (Air Services), Ltd., supra,* has added a special note of confusion to an already perplexing situation. The judge in that case apparently applied the statutory bar to review found in

Sec. 1006 to an original action challenging unauthorized Board action in district court. See *Donaldson Line, supra,* 343 F. Supp. at 1062.

Thus, a review of the applicable case law in the area presents the following picture: three courts of appeals' decisions have suggested the possibility of review of Board action in respect to foreign carrier permits subject to Presidential approval; several other cases have held that only actions in respect to domestic carriers are subject to review; and at least one district court has concluded that no review is permissible of foreign permit actions if Presidential approval is involved. Behind this contradictory body of case law lies this Court's original formulation in *Waterman* which would appear to prohibit review of *any* order subject to Presidential approval. Petitioners submit that the time is appropriate for a re-examination of this important subject.

II

The limitation of judicial review under Sec. 1006, while not surprising given the statute's language, is open to considerable question when one examines the available evidence expressing the intentions of the legislation's principal architects and sponsors. It is particularly instructive, for example, to note that the repeated references to the need for safeguarding executive discretion, which were made by the Administration's spokesman for its bill, draw no distinctions between foreign and domestic carrier routes in foreign and overseas air transportation. In fact, frequent references are made to the need for insulating Presidential discretion in regard to domestic airlines flying over the

United States.[4] It is likewise important to recognize that the drafters of the Administration bill and the early versions of the legislation as introduced in the House specifically reserved for the courts of appeals the right to determine whether a particular question was subject to judicial review or confined to Presidential discretion. See House Hearings, *supra* at 53, 54.

The legislative history of the 1938 Act compels the conclusion that the purpose of Secs. 1006 and 801 taken together was to incorporate a still nascent and evolving judicial approach to the political question and foreign affairs power doctrines into the statute. In fact, the Administration's drafts of the bill and the House Reports on its version of the legislation expressed this position explicitly by noting that courts would determine their own competence to review final Board actions.[5] Nothing in the subsequent legislative history contradicts this interpretation of the statute.

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[4] *See in particular* the comments of Clinton M. Hester, Assistant Secretary of Treasury at Hearings on H.R. 9738, To Create a Civil Aeronautics Authority, Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3rd Sess. (hereinafter House Hearings), at 37-41 and 147-148, and at Hearings on S. 3760, To Create a Civil Aeronautics Authority, Before the Senate Commerce Committee, 75th Cong., 3d Sess. at 6, 7.

[5] *See* draft of H.R. 9738 introduced by Congressman Lea, House Hearings, *supra* at 25-30. The colloquy between Assistant Secretary Hester and Congressman Mapes at 53-54 of the House Hearings, *supra* confirms this view. Further, the Report on H.R. 9738, which passed the House, states that "[u]pon final decree the courts of appeals can take whatever action may be appropriate to the case within their constitutional powers by ordering further proceedings or otherwise. Such final decrees would be subject to review by the Supreme Court." H. Rep. 2254, from the Committee on Interstate and Foreign Commerce, on H.R. 9738, 75th Cong., 3rd Sess., April 28, 1938 at 11.

Seen in this light, the final language of the statute does no more than reflect the attitude that courts had historically taken to questions of executive discretion prior to 1938. This interpretation of Congressional intent is entirely consistent with the *Waterman* opinion, which makes no distinction between United States and foreign carriers in discussing the application of Presidential discretion.

III

A restrictive interpretation of Sec. 1006 that prohibits review of all air permit decisions subject to Presidential approval may be reasonable so long as such interpretation remains consistent with prevailing notions of justiciability.[6] However, a truly anomalous situation has been created today when rigid formulations of the political question and foreign affairs power doctrines have been replaced by new concepts of justiciability set forth in *Baker* v. *Carr*, 369 U.S. 186 (1962). Under this case and its progeny, any assertion of non-justiciability based upon political question or foreign affairs considerations is to be subjected to a "discriminating analysis" according to specific standards which have been fully articulated in the *Baker* opinion at 217. These standards require the examination of possible political or foreign policy consequences of review in each case presented and the rejection of uncritical deference to claims of administrative or executive discretion.

Since in the instant case, petitioners challenge solely the refusal of the Board to hear evidence of discrimination, in circumstances where SAA's evidence of non-discrimination was introduced and incorporated in the Board's findings, no foreign affairs interest or issue of Presidential discretion is involved. Petitioners do not question in this proceeding the power of the President to authorize the route in question once an adequate record has been created by the Board. Nor do petitioners maintain that the current operation of the route in question need necessarily be suspended pending a new hearing before the Board.

[6] Thus the Waterman majority cites with approval a number of cases which strictly circumscribe the power of courts to scrutinize Executive decisions once a question of politics or foreign policy has been raised. See cases cited in Waterman, *supra* 333 U.S. at 111, 112.

Because no possible foreign affairs interest can be identified in the instant case under prevailing standards of justiciability, there is no policy reason for denial of review of petitioners' claims in the Court of Appeals. If Congress clearly intended that courts apply their own evolving standards of justiciability, a reading of the statute to preclude a review in circumstances such as this is both unwarranted and a serious distortion of legislative intent.

IV

The evolution of the *Waterman* doctrine from 1948 to the present has created insurmountable barriers to judicial review of Board misconduct or unconstitutional action. The courts of appeals, which have been legislatively designated as the review authority in CAB cases, have, with a few notable exceptions, refused to act on such allegations in the belief that they are limited by statutory language as construed, expressly or impliedly, by *Waterman*. At the same time, district courts are uncertain as to the scope of their authority and litigants are left without even minimal guidelines as to the appropriate forum – or whether there is any forum – for the resolution of their complaints. Basic tenets of judicial management urge that this situation be clarified.

In the instant case, the Court of Appeals followed the precedents limiting Sec. 1006 to its literal terms. The Court

also cited two additional cases for the proposition that the clear language of a statute does not permit review of legislative intent or policy. See *Caminetti* v. *United States*, 242 U.S. 470 (1917) and *March* v. *United States*, 506 F.2d 1306 (D.C.Cir. 1974). This uncritical resort to the plain meaning rule conflicts sharply with this Court's frequently stated view that the intention of Congress, considerations of policy, and the purpose of legislation should be consulted in circumstances where a literal interpretation of a statute produces an unreasonable result. *Philbrook* v. *Glodgett*, 95 S.Ct. 1893, 1898 (1975); *Cass* v. *United States*, 417 U.S. 72, 77-79 (1974); *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892).[7]

The effect of the lower court decision in the instant case is to require petitioners to institute a new proceeding in district court with no assurance that the barrier of Sec. 1006 will not be raised there again. Regardless of the outcome of a district court proceeding, the issues of this case will undoubtedly be presented to the Court of Appeals through the appeal of the losing party. Given current standards of justiciability, and the intent of Congress in passing the 1938 Act, such a result is clearly unreasonable.

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[7] The restrictive view of Sec. 1006 adopted below also stands in sharp contrast to the general hesitancy this Court has shown to limit the scope of judicial review of agency action. *See, e.g.*, Barlow v. Collins, 397 U.S. 159, 166-167 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Leedom v. Kyne, 358 U.S. 184, 190 (1958).

CONCLUSION

The urgency of review by this Court in the present case is, if anything, greater than in past instances where Board action has been asserted to be beyond statutory authorization or constitutional bounds. In the instant case, we confront not conventional questions of economic rights, but rather the basic issue of possible governmental participation in acts of racial discrimination and a significant question of procedural due process.[8] The implications of the Court of Appeals' decision in this case for future aviation litigation are most grave: a federal agency may now be insulated from judicial review of unauthorized procedural and substantive actions which have the effect of placing before the President erroneous findings of fact on a highly sensitive issue. The process by which Presidential discretion might legitimately be exercised may be corrupted by unauthorized Board action if judicial review is denied.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1975

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[8] The denial to one party at a CAB hearing of the opportunity to present evidence in rebuttal of evidence introduced by another party has been held to violate due process. *See* Northeast Airlines, Inc. v. CAB, 345 F.2d 484 (1st Cir. 1965).

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles Coles DIGGS et al., Petitioners,

v.

CIVIL AERONAUTICS BOARD, Respondent,

South African Airways, Intervenor.

No. 73-2194.

United States Court of Appeals, District of Columbia Circuit.

Argued April 3, 1975.

Decided Aug. 4, 1975.

Judgment this

An appeal was taken from an order of the Civil Aeronautics Board, approved by the President, authorizing a foreign airline to service a new route between South Africa and New York. The Court of Appeals held that under a Federal Aviation Act section providing for original jurisdiction of the Courts of Appeals to review orders of the Board but excepting any order in respect of any foreign air carrier subject to the approval of the President, the Court of Appeals did not have original jurisdiction to review the order, despite the contention that the order was invalid and that invalidity could not be cured by presidential approval.

Petition dismissed.

Aviation ⇐77

Under Federal Aviation Act section providing for original jurisdiction of Courts of Appeals to review orders of the Civil Aeronautics Board but excepting any order in respect of any foreign air carrier subject to the approval of the president, Court of Appeals, did not have original jurisdiction to review CAB order, approved by the president, authorizing foreign airline to serve new route between South Africa and New York, despite contention that order was invalid and that invalidity could not be cured by presidential approval. 28 U.S.C.A. § 294(d); Federal Aviation Act of 1958, §§ 101(19), (21)(c), 402, 402(b), 404(b), 1006(a), 49 U.S.C.A. §§ 1301(19), (21)(c), 1372, 1372(b), 1374(b), 1461, 1486(a).

Petition for Review of an Order of the Civil Aeronautics Board.

Roderic V. O. Boggs, Washington, D. C., with whom Goler Teal Butcher and

Vaughn C. Williams, Washington, D. C., were on the brief for petitioners.

Barbara Thorson, Atty., Civ. Aeronautics Bd., with whom Thomas J. Heye, Gen. Counsel, O. D. Ozment, Deputy Gen. Counsel, Glen M. Bendixsen, Associate Gen. Counsel, Litigation and Research, Civ. Aeronautics Bd., and Carl D. Lawson, Atty., Dept. of Justice, were on the brief for respondent.

Brice M. Clagett, Washington, D. C., was on the brief for intervenor.

Before ROBINSON and ROBB, Circuit Judges, and SOLOMON,* Senior United States District Judge for the District of Oregon.

Opinion Per Curiam.

PER CURIAM:

Petitioners, members of the House of Representatives and four associations who represent the interests of black Americans, appeal from an order of the Civil Aeronautics Board (CAB), which authorized South African Airways (SAA) to serve a new route between Johannesburg, South Africa, and New York. The order was adopted under Section 402 of the Federal Aviation Act, 49 U.S.C. § 1372, and approved by the President under Section 801 of the Act, 49 U.S.C. § 1461.

Petitioners assert that the CAB's order violated Sections 402(b) and 404(b) of the Act, 49 U.S.C. §§ 1372(b) and 1374(b). They contend that these sections prohibit the CAB from issuing a permit to a foreign air carrier which discriminates among its passengers on a racial basis and that the CAB violated these sections by refusing to hear evidence that SAA discriminates against blacks on its domestic connecting flights and in its facilities in South Africa.

This Court's original jurisdiction to review CAB orders is limited by Section 1006(a) of the Act, 49 U.S.C. § 1486(a). That section provides that an "order in respect of any foreign air carrier subject to the approval of the President" is not reviewable. Under Section 101(19) of the Act, 49 U.S.C. § 1301(19), a foreign air carrier is defined as "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." Under Section 101(21)(c) of the Act, 49 U.S.C. § 1301(21)(c), foreign air transportation is defined as "the carriage by aircraft of persons . . . between . . . a place in the United States and any place outside thereof . . . ."

CAB and SAA have moved to dismiss the petition for review on the ground that Section 1006(a) is a jurisdictional bar. Petitioners argue that when the CAB submits an order that is invalid on constitutional or statutory grounds—alleged to be the situation here—Presidential approval will not cure the defect. We are therefore urged to construe Section 1006(a) so that we may consider this petition even though the challenged order was subject to Presidential approval and was so approved.

The explicit language of Section 1006(a) does not permit such interpretation. *See* Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917); March v. United States, 165 U.S.App.D.C. 267, 274, 506 F.2d 1306, 1313 (1974). An examination of the statutory language, particularly when there is no relevant legislative history, persuades us that Section 1006(a) was intended to mean what it says. Petitioners place their principal reliance on American Airlines, Inc. v. CAB, 121 U.S. App.D.C. 120, 348 F.2d 349 (1965), and Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), aff'd by an equally divided Court, 391 U.S. 461, 88 S.Ct. 1715, 20 L.Ed.2d 748 (1968), but neither case supports petitioners. Neither allows judicial review otherwise prohibited by the express language of the statute. Instead, both of them limit the extent to which Section 1006 is to be expanded beyond its literal language and prohibit review of CAB action involving domestic as distinguished from foreign carriers engaged in foreign air transportation. Indeed, Judge J. Skelly Wright, in a previous decision by this court, Pan American World Airways, Inc. v. CAB, 129 U.S.App.D.C. 159, 392 F.2d 483 (1968), distinguished *American Airlines* and the earlier *Pan American* case from cases involving foreign air carriers.[1]

We hold that the clear and unambiguous language in Sections 1006(a), 101(19) and 101(21)(c) of the Act deprives us of jurisdiction to review the challenged order. British Overseas Airways Corp. v. CAB, 113 U.S.App.D.C. 76, 304 F.2d 952 (1962); Dan-Air Services, Ltd. v. CAB, 154 U.S.App.D.C. 297, 300–301, 475 F.2d 408, 411–412 (1973). Accordingly, we do not reach the merits of petitioners' constitutional contentions, nor do we decide whether the District Court has jurisdiction over this action. *See* Pan American World Airways, Inc. v. CAB, 129 U.S. App.D.C. 159, 170, 392 F.2d 483, 494 (1968).

Petition dismissed.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

1. He found that "[t]he cases have not dealt squarely with the explicit 'foreign air carrier' jurisdictional bar of Section 1006 itself. . . ." 129 U.S.App.D.C. at 167, 392 F.2d at 491.

Judge Wright went on to say:

"Both *American Airlines* and *Pan American World Airways* involved orders with respect to *citizen* air carriers subject to Presidential approval. Consequently, in those cases any putative limitation on direct Circuit Court review stems from the Waterman [Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948)] gloss on Section 1006, not from Section 1006 itself; for in *Waterman* non-reviewability is premised merely on Presidential approval, not on explicit statutory language.

. . . . . .

"But where a foreign air carrier is involved, the issue is not whether the reach of a statute should be extended beyond its apparent coverage because of considerations of national defense and foreign policy; rather it is whether an exception should be carved from the plain language of the statute itself. Certainly *American Airlines* and *Pan American World Airways* are not dispositive where this latter question is at issue. And in *British Overseas Airways Corp.*, which did involve the reviewability of an order with respect to a foreign air carrier, relying on the plain language of Section 1006 we said that there could be no direct review in this court 'now or later.'" 129 U.S. App.D.C. at 169, 392 F.2d at 493.

APPENDIX B

73-10-2

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

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DOCKET 24944 Served: October 3, 1973

SOUTH AFRICAN AIRWAYS

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Decided: September 5, 1973

Foreign air carrier permit held by South African Airways amended to authorize the carrier to serve a new route via Sal Island and Las Palmas between the existing terminal points Johannesburg, South Africa, and New York, subject to conditions.

APPEARANCES:

Same as in the recommended decision and, in addition, the following:

David S. Tatel and *Vaughn C. Williams* for the Joint Intervenors

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OPINION

BY THE BOARD:

South African Airways, an air carrier of the Republic of South Africa, has filed an application seeking amendment of its foreign air carrier permit so as to enable it to engage in foreign air transportation between the terminal point Johannesburg, South Africa, the intermediate points Sal Island and/or Las Palmas, and the terminal point New York.[1] Provision for the operation of the

[1] The carrier's current authority permits it to operate between New York and South Africa via Rio de Janeiro.

new route is made in the bilateral agreement between the United States and the Republic of South Africa and the carrier has been designated by its Government to operate the route.

Following a public hearing, Administrative Law Judge Ross I. Newmann issued a decision in which he recommended that the carrier's permit be amended as requested in its application. Exceptions to the recommended decision have been filed by a group denominated the Joint Intervenors[2] and by the applicant. Briefs to the Board were filed on June 27, 1973 by the applicant and the Joint Intervenors. The Bureau of Operating Rights adopted its brief to the Administrative Law Judge. A request for oral argument has been made by the Joint Intervenors.

Upon consideration of the matters presented, the Board has decided to follow the Administrative Law Judge's recommendation.[3] Except to the extent modified herein,

[2] The Joint Intervenors include the American Committee on Africa; the Black United Front of Washington; the African Heritage Studies Association; IFCO-Action; and the following members of the House of Representatives: Shirley A. Chisholm, William L. Clay, John Conyers, Ronald V. Dellums, Charles C. Diggs, Walter E. Fauntroy, Augustus F. Hawkins, Barbara Jordan, Ralph H. Metcalfe, Parren J. Mitchell, Robert N.C. Nix, Charles B. Rangel, Louis Stokes, and Andrew Young.

[3] We shall affirm his decision to limit the new authority to the terminal point Johannesburg. The carrier's application requested new authority only to Johannesburg and an expansion of the terminal point description at this stage is strongly opposed. Moreover, the applicant has indicated its current intention to operate only from Johannesburg and stated that it would accept a permit limited to that point (Tr. 19, 31-32). Under all these circumstances, we shall follow the recommendation of Judge Newmann.

the Board adopts as its own the findings, conclusions, and recommendations of the Administrative Law Judge; his recommended decision is attached as an appendix.[4] We have also decided to deny the request for oral argument since the matters presented involve questions of law and policy which have been fully presented on brief.

The basic argument now presented by the Joint Intervenors concerns the Administrative Law Judge's exclusion of evidence concerning (a) the applicant's racial practices on intra-South Africa connecting flights which are utilized by passengers with through tickets from New York to a point in South Africa other than Johannesburg, (b) the racial practices at domestic airport facilities in South Africa utilized by these passengers, and (c) the racial practices at other facilities utilized by these passengers in connection with charter services, when such facilities are arranged by the applicant. See Prehearing Conference Report, February 23, 1972, and Supplemental Prehearing Conference Report, March 8, 1972. The Joint Intervenors argue that consideration of these three excluded matters is necessary and relevant to a proper Board determination of the issues in this proceeding. They request either a denial of the carrier's application or a remand for further hearing.

We find no error in the Administrative Law Judge's ruling which would require either denial of the carrier's application or remand of this proceeding for further hearing. Under the Act, the Board is required to appraise the

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[4] We will clarify slightly the stipulated charter condition contained in the proposed permit. In so doing, however, it is not our intention to alter the substance of the proposed condition.

transportation authority requested in a carrier's application and determine whether such transportation can be performed in conformance with statutory requirements and the public interest. The transportation requested to be performed by South African Airways includes new services between New York and Johannesburg via Sal Island and/or Las Palmas, and the evidence supports Judge Newmann's finding that the applicant will perform these services in conformity with the Act and the public interest. As the record indicates, the applicant does not discriminate on the basis of race on any of its international flights (SAA Exhibit 10, Tr. 30) and it makes its facilities and accessorial services available on a non-discriminatory basis. There is no racial segregation, for example, with regard to the ground services provided by the carrier between the airport and downtown Johannesburg. (Tr. 26-27). It also appears that the facilities and services utilized by the carrier and its passengers at the international section of Jan Smuts Airport in Johannesburg are available to all on an equal basis (Tr. 23-26).

The Board appreciates that under established international practice a carrier may link its operations under a permit issued by the Board to its operations within its home country. However, the Board does not consider that the existence of this behind-gateway ancillary authority makes it incumbent upon the Board to examine, in the course of a permit proceeding, the nature of the service the applicant provides to its passengers within its own home country.[5] Similarly, the Board does not believe it is required to examine the full range of facilities which

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[5] Rather, such service is generally conducted pursuant to, and in accordance with, the laws of that country.

may be used by U.S. citizens visiting a foreign country.[6] The effect of such examination would be to require the Board to evaluate the activities of a foreign carrier within its home country and to pass judgment on the internal policies of a foreign government. Such evaluation would necessarily inject the Board into the complex and delicate diplomatic questions affecting relations between the United States and a friendly foreign nation. In our judgment, such involvement would neither be practicable nor redound to the benefit of the public interest. See *Pan American World Airways* v. *C.A.B.*, 392 F.2d 483 (D.C. Cir 1968); see *McCullouch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Foley Bros. Inc.* v. *Filardo* 336 U.S. 281 (1949); *South African Airways* v. *N.Y. State Division of Human Rights*, 315 N.Y.S. 2d 651 (Sup. Ct. 1970). In these circumstances, the Board does not believe that it should utilize whatever authority it may possess under sections 402 and 404 of the Federal Aviation Act to reach, directly or indirectly, activities conducted in an applicant's home country when those activities are not dependent upon Board authorization. Thus, however deeply the Board may deplore the racial policies and practices involved, it finds itself in agreement with the Administrative Law Judge that the scope of the Board's inquiry should be limited in this case to an examination of those international services specifically authorized in the applicant's amended permit.

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[6] We have, of course, examined the international airport facilities at Johannesburg which are used by the applicant in the provision of its U.S.-South Africa service and we agree with Judge Newmann that the record shows that such facilities will be available to all U.S. citizens on an equal basis.

In view of the foregoing and all the facts of record, the Board finds:

1. That it is in the public interest to amend the foreign air carrier permit held by South African Airways so as to authorize the carrier to engage in foreign air transportation between the terminal point Johannesburg, South Africa, the intermediate points Sal Island and Las Palmas, and the terminal point New York.

2. That the public interest requires that the exercise of the privileges granted by said permit shall be subject to the terms, conditions, and limitations contained in the form of permit attached to the accompanying order, and to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

3. That South African Airways is fit, willing, and able properly to perform the above-described foreign air transportation and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

4. That except to the extent granted herein, the application, and all other requests in this proceeding, should be denied.

An appropriate order will be entered.

TIMM, Chairman, GILLILLAND, Vice Chairman, MINETTI and MURPHY, Members of the Board, concurred in the above opinion.

APPENDIX

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

SOUTH AFRICAN AIRWAYS
FOREIGN AIR CARRIER PERMIT AMENDMENT
JOHANNESBURG-SAL ISLAND-LAS PALMAS-NEW YORK
DOCKET 24944

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE ROSS I. NEWMANN

Served: May 21, 1973

Upon:

Brice M. Clagett, Covington & Burling, 888 Sixteenth Street, N.W., Washington, D.C. 20006, for South African Airways.

Barry M. Smoler, Shaw, Pittman, Potts & Trowbridge, 910 Seventeenth Street, N.W., Washington, D.C. 20006, for Overseas National Airways, Inc.

Peter J. Connell, 733 Fifteenth Street, N.W., Washington, D.C. 20005, for the Joint Intervenors.

Jerome B. Blum, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428, for Bureau of Operating Rights.

Exceptions, if any, must be filed with the Docket Section, Civil Aeronautics Board, Washington, D.C. 20428, and served upon all parties within 10 days from the date of service shown above. Briefs in support of exceptions may be filed and served upon all parties within 20 days after the date fixed for filing exceptions.

* * * * *

Recommended that South African Airways' foreign air carrier permit be amended to authorize that carrier to engage in foreign air transportation of persons, property, and mail between Johannesburg, South Africa, Sal Island and/or Las Palmas, and New York, New York, subject to conditions.

Appearances:

Brice M. Clagett and *Cary W. Dickieson* for South African Airways.

Peter J. Connell and *Steven Bordsky* for the Joint Intervenors.

Elaine Bloomfield for the Equal Employment Opportunity Commission.

Jerome B. Blum for the Bureau of Operating Rights.

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE ROSS I. NEWMANN

This proceeding involves the application of South African Airways (SAA), Docket 24944, for an amendement of its foreign air carrier permit to carry persons, property and mail between Jan Smuts Airport, Johannesburg, Sal Island and/or Las Palmas, and J.F. Kennedy Airport, New York. The application also requested authority to engage in off-route charter operations pursuant to Part 212 of the Board's Regulations.[1] Permission to intervene has been granted to Overseas National Airways, Inc., and to 15 members of Congress who are members of the Black Congressional

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[1] Authority to conduct off-route charters was granted to SAA in Order 68-11-41, dated November 7, 1968.

Caucus;[2] the American Committee on Africa; the Black United Front of Washington, D.C.; the African Heritage Studies Association; and IFCO-Action (hereinafter referred to as the Joint Intervenors).

Public hearing was held in Washington, D.C., on April 9, 1973. Briefs to the Administrative Law Judge were filed on May 7, 1973, by SAA, the Joint Intervenors, and Bureau Counsel. Overseas National did not appear at the hearing, did not present any exhibits, and did not file a brief. Pursuant to a stipulation between SAA and Overseas National dated March 8, 1973, SAA agreed to accept the following restriction in its permit:

> "The authority granted to South African Airways in this permit does not include authority to perform on-route charter transportation of passengers between New York, on the one hand, and Las Palmas, on the other hand, but this restriction does not preclude on-route charter transportation of passengers between New York and Johannesburg with one or more non-traffic stops (of unlimited duration) in Las Palmas."

In the light of this stipulation, Overseas National agreed that it would not oppose SAA's application in this proceeding and that it would not participate in any further procedural steps in this case.

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[2] Members of the Black Congressional Caucus are Charles Coles Diggs, Yvonne Brathwaite Burke, Shirley Anita Chisholm, William Lacy Clay, John Conyers, Ronald V. Dellums, Walter E. Fauntroy, Augustus F. Hawkins, Barbara Jordan, Ralph Harold Metcalfe, Parren James Mitchell, Robert N.C. Nix, Charles B. Rangel, Louis Stokes, and Andrew Young.

The Equal Employment Opportunity Commission (EEOC) appeared at the hearing pursuant to Rule 14 of the Board's Rules of Practice and submitted a Statement of Position. EEOC takes no position on the merits but submitted its Statement in order to offer the Administrative Law Judge a general discussion of fair employment law so the parties can better understand the Title VII issue raised in this proceeding.

THE ISSUES

The issues in this proceeding are as follows:

1. Will the foreign air transportation proposed by the application of South African Airways be in the public interest?

2. Is the applicant substantially owned and effectively controlled by citizens of the Government of the Republic of South Africa?

3. Is the applicant fit, willing, and able to properly perform the foreign air transportation proposed in its application and to conform to the provisions of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and requirements of the Board thereunder?

4. Is the applicant in compliance with Titles II and VII of the Civil Rights Act of 1964, and sections 404(b) and 411 of the Federal Aviation Act of 1958, as amended?

5. If the application is granted, what should be the duration of the permit and what other terms, conditions, and limitations, if any, should be attached thereto?

THE BILATERAL AGREEMENT

The route annex to the Air Transport Agreement between the United States and the Republic of South Africa, as amended by exchanges of notes effective on May 23, 1947, and June 28, 1968, provides for designated airlines of the Republic of South Africa to operate two routes. Route numbered "1" is described as "South Africa via points in Africa south of the Equator, the Cape Verde Islands, the Canary Islands, Spain*, and Portugal* to New York." The Government of the Republic of South Africa has designated SAA to conduct air services on said route and the route embraced by SAA's application involved herein conforms to said route numbered "1" except that it is limited to Johannesburg, South Africa.

THE APPLICANT

SAA holds a foreign air carrier permit issued by the Board, pursuant to Order 68-11-41[3] to engage in (a) the foreign air transportation of persons, property, and mail between a point or points in the Republic of South Africa, the intermediate point Rio de Janeiro, Brazil, and the terminal point New York, N.Y., and (b) off-route charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

SAA presently operates one roundtrip flight per week between Johannesburg and New York via Rio de Janeiro.

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* Without traffic rights beween points in these countries and New York.

[3] South African Airways, Docket 20054, approved by the President on November 7, 1968.

Since the inauguration of this service in February 1969, SAA has carried more than 13,000 passengers and nearly two million pounds of cargo and mail.

SAA proposes to continue to operate its present flight via Rio de Janeiro, departing Johannesburg Saturday morning for arrival in New York Saturday evening, and departing New York late Monday morning for arrival in Johannesburg Tuesday afternoon. The new flight via Ilha do Sal would depart Johannesburg Thursday evening for arrival in New York Friday morning and depart New York Friday afternoon for arrival in Johannesburg Saturday afternoon. The new route will be 1200 statute miles shorter than the old, and the schedules are faster by more than two hours eastbound and three hours westbound.

SAA plans to utilize Boeing 707-320B and 707-320C aircraft, seating 16 first class and 123 economy class passengers. When the volume of cargo requires, the aircraft can also be operated in a combined passenger/freighter service with three cargo pallets and 108 passenger seats. The applicant has no plans at this time to use wide-body equipment on either its present or proposed route. SAA will charge the rates and fares which have been approved by IATA for the new route.

In 1972, SAA's revenues exceeded $175 million annually and its identifiable assets were in excess of $380 million. SAA's fleet consists of 5 Boeing 747 aircraft, 8 Boeing 707s, 9 Boeing 727s, 6 Boeing 737s, and 3 Hawker Siddeley 748 aircraft. All of these planes are wholly owned by SAA and were paid for in full on the date of delivery.

SAA's headquarters in the United States are located in New York. It also has offices in Chicago, Houston, Los

Los Angeles, and San Francisco.

SAA is owned and controlled by nationals of the Republic of South Africa and is an instrumentality of the Government of South Africa. All of SAA's officers have extensive experience in transportation and aviation and all are South African citizens. None has any direct interest in any other carrier, foreign air carrier, other common carrier, or business engaged in a phase of aeronautics.

POSITIONS OF THE PARTIES

SAA.

SAA takes the position that the proposed service is in the public interest, that it is fit, willing, and able to perform the proposed service, and that its application should be granted in the form it has requested below. It contends that its employment practices in the United States are not discriminatory, that it does not discriminate in its services in foreign air transportation, and that its advertising policies have not been in violation of section 411 of the Act. SAA therefore sees no need to impose a condition relating to advertising, as suggested by Bureau Counsel. SAA also opposes a condition suggested by the Bureau which would allow the Board, its agents and auditors access to all facilities in, or records required to be kept in, the United States. Finally, SAA urges that its permit be amended to designate "a point or points" in South Africa as the terminal for the new route, as provided by the bilateral agreement, rather than the designation of Johannesburg, South Africa, as requested in its application.

Joint Intervenors

The Joint Intervenors contend that SAA's application should be denied because the Board is authorized to issue

a permit only if it finds the applicant fit, willing, and able and that the proposed transportation will be in the public interest. They argue that facts bearing upon the racially discriminatory visa policies of the South African Government and racial segregation of passengers in foreign air transportation within South Africa are crucial to the Board's determinations. Requests by the Joint Intervenors to submit evidence on those issues, the Joint Intervenors contend, were denied and consequently the Board is not in a position to decide whether SAA is fit, willing, and able to perform such transportation or whether such transportation would be in the public interest.

Bureau of Operating Rights.

The Bureau believes that approval of the application is in the public interest, that SAA is fit, willing, and able to perform the proposed service, and that SAA's permit should be amended to authorize scheduled foreign air transportation between New York and Johannesburg via Sal Island and/or Las Palmas. BOR takes the position that the evidence in this proceeding does not indicate that SAA is in violation of Titles II and VII of the Civil Rights Act of 1964 and/or sections 404(b) and 411 of the Federal Aviation Act of 1958, as amended.

FINDINGS AND CONCLUSIONS

The Board has consistently held that where an outstanding bilateral agreement provides for the routes in question, it is normally in the public interest to grant the permit unless sufficient reasons are shown to establish that such grant would be contrary to the public interest. Thus, the existence of the bilateral agreement and the designation of a carrier thereunder constitute highly significant evidence

bearing upon the public interest which, except in extraordinary circumstances, lies with the faithful adherence to our international agreements.[4] It is necessary to examine the factual record in this case in order to determine whether there are extraordinary circumstances which require that SAA's application be denied.

The proposed route was provided for in the bilateral air transport agreement between the Republic of South Africa and the United States, and the Republic of South Africa has designated SAA to operate the route. The record shows that SAA is an instrumentality of the Government of South Africa, and the scope of its present operations, the size and quality of its aircraft fleet, its experienced management and financial strength, insurance coverage, and good safety record make it well qualified to operate the proposed route.

The Joint Intervenors contend that the Board is not in a position to decide whether SAA is fit, willing, and able because certain requests by the Joint Intervenors for the submission of evidence bearing upon racially discriminatory visa policies and racial segregation of passengers within South Africa were denied. The contention of the Joint Intervenors is wholly without merit and must be rejected.

The issues in this proceeding specifically included the question whether SAA is in compliance with section 404 (b) of the Federal Aviation Act. Under this provision, the Board is empowered to prevent discrimination in air transportation. The Joint Intervenors, however, sought to

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[4] *British Overseas Airways Corporation, Foreign Permit Amendment,* 29 C.A.B. 583 (1959); *Eagle Airways (Bahamas) Ltd.,* 33 C.A.B. 222 (1960).

use this proceeding as a forum to inquire into the policies and practices of the South African Government relating to visa applications as well as the questions of racial discrimination and employment practices within South Africa. This is not the proper proceeding to resolve these questions. Any attempts to deal with another government's general racial or religious practices, as distinguished from discrimination in air transportation, should be the subject of a single overall U.S. policy. In the absence of enactment by the Congress of an overall government policy, only the President can fashion a policy covering not only the Board but other government agencies as well.

It is the Board's responsibility, however, in considering the applicant's fitness, to carefully examine the facts to determine whether the applicant has conformed to the provisions of the Federal Aviation Act and other related statutes, including the Civil Rights Act of 1964, insofar as its operations in foreign air transportation are concerned. Detailed evidence was submitted in this proceeding bearing upon SAA's employment practices in the United States and matters of discrimination in foreign air transportation. In addition, evidence was submitted relating to SAA's advertising practices to determine whether the applicant has complied with section 411 of the Federal Aviation Act.

Discrimination.

The evidence of record demonstrates that SAA does not discriminate racially or on any other basis in any of the services or facilities it employs in foreign air transportation. SAA has not restricted, and its witness testified that it does not intend to restrict, any person desiring to travel to or from the United States from using its services so long as that person is in possession of the travel documents

required by the country of destination. It has transported, and asserts it will continue to transport, nonwhite passengers on its aircraft. It does not distinguish in any manner based on race among passengers travelling on its flights in foreign air transportation. No facilities in any of SAA's aircraft or flights in foreign air transportation are segregated by race.

The record also shows that there is no discrimination as to United States citizens at facilities utilized by SAA in South Africa on its flights to or from the United States. No facilities at the Johannesburg International Airport are segregated on the basis of race, and no facilities at the adjacent domestic airport are restricted racially as to citizens of the United States or citizens of countries other than South Africa. Bus transportation to and from Johannesburg or Pretoria which is provided by SAA does not discriminate among passengers on the basis of race. The carrier's witness testified that even though SAA's domestic flights are not part of foriegn air transportation and are not involved in the present application, there is no racial discrimination on any of SAA's domestic flights within South Africa.

Title VII of the Civil Rights Act of 1964, bars discrimination in employment practices. The record shows that SAA has not discriminated in its hiring practices in the United States on the basis of race, religion, sex or national origin. It has instructed the employment agencies which it utilizes not to discriminate and those agencies have confirmed these instructions. Personnel advertisements placed on SAA's behalf clearly indicate SAA's policy of nondiscrimination.

All final decisions on hiring of personnel in the U.S. are made by SAA's North American manager, Mr. Reginald

G. Brett, who has held that position since SAA received its permit in 1968. He testified that he has never discriminated on the basis of race, religion, sex or national origin in his hiring decisions. He also testified that employees holding equivalent jobs are paid on the same established salary scale, and that salary increases within the scale are based solely on longevitiy. All employees receive the same travel benefits.

Conditions.

Section 411 of the Act prohibits deceptive practices in air transportation. The question was raised in the Prehearing Conference Report whether SAA has, in the past year, in connection with air travel to or from the U.S., advertised facilities that are not uniformly available to all members of the travelling public.

The record shows that over the years the Board's Bureau of Enforcement has maintained a close scrutiny over SAA's advertising. No enforcement proceeding has been instituted against SAA, since any questions that have arisen have been satisfactorily resolved by agreement between SAA and Enforcement. These questions did not relate to the advertising of any services or facilities offered by SAA, but to a few incidental references in SAA advertising to attractions or amenities available to tourists who visit South Africa.

Since 1969, the Bureau of Enforcement has taken the position that SAA should refrain in its advertising from making incidental references to attractions or amenities which are not freely and equally available to all races. SAA has undertaken to abide by such a policy and has instructed its advertising agency accordingly.

The record in this case demonstrates that SAA has complied with section 411 of the Act in its advertising practices and has cooperated fully with the efforts and inquiries of the Bureau of Enforcement. Under the circumstances, there is no reason to impose a condition in SAA's permit requiring the carrier to refrain from misleading advertising. Any questions which might arise in the future under section 411, or under any other provisions of the Act or the Board's Regulations, can be appropriately dealt with by the Bureau of Enforcement.

Another condition raised by Bureau Counsel prior to the prehearing conference would require SAA to allow access to the Board, its special agents or auditors, to all lands, buildings, equipment, accounts, records, and memoranda kept in the United States. There is no evidence in this record to support the imposition of such a condition, nor is there any indication that the Board has imposed a similar condition on any other foreign air carrier. Under the circumstances, no such condition will be imposed here.

The Bureau has recommended that the Board's standard condition relating to insurance be incorporated in SAA's permit. No objection was raised by SAA and such a condition will be imposed.

The permit will also contain a condition prohibiting SAA from performing on-route charter transportation of passengers between New York and Las Palmas, which implements a stipulation between SAA and Overseas National.

South African Terminal Point.

As previously pointed out, the bilateral agreement provides for a route between a point or points in South

Africa and New York, via intermediate points. The application in this proceeding, however, did not apply for a point or points in South Africa but was limited to the single terminal point of Jan Smuts Airport, Johannesburg. The exhibits submitted by SAA show that service to New York will be provided from the single terminal point Johannesburg. On cross-examination, Mr. F. J. Swarts, Deputy Commercial Director of SAA, testified as follows:

"Q. Your application in this case, Mr. Swarts, seeks authority to operate between the United States via Sal Island and Las Palmas and Johannesburg Airport, correct?

"A. Correct.

"Q. In other words, your proposed operations, if granted the authority you are seeking in this case, would be limited to Johannesburg Airport.

"A. Correct."

On redirect examination, Mr. Swarts testified that SAA's present authority permits flights from any point in South Africa via Rio de Janeiro to New York and the carrier would like to preserve the same option as to flights on the new route. He stated, however, that if the Judge or the Board should rule that since the application specifies only Johannesburg, SAA would accept an amendment of its permit which limits its authority on the new route to Johannesburg.

When questioned at the hearing by the Administrative Law Judge as to legal notice, Counsel for SAA replied:

"If your Honor feels that the difference is enough to raise a problem, then we could certainly

accept a permit with only Johannesburg in it, but I assume that wouldn't affect the existing route which already reads any point or points in South Africa. . ."

Counsel for the Joint Intervenors then stated:

"If there is a possibility that SAA be given authority to any airport in South Africa, or from any airport in South Africa to New York, I would respectfully submit you reconsider your decision excluding intervenors [questions] regarding SAA flights within South Africa and regarding [separate] facilities at airports other than Johannesburg."

On brief, Counsel for SAA points out that in the original proceeding in 1968, SAA applied only for Johannesburg but the permit issued by the Board authorized service to a point or points in South Africa. Counsel asserts this is a long-established policy and should be followed here.

While it is correct that the Board has in the past granted a foreign air carrier broader authority than its application applied for by authorizing service to a point or points in the home country in conformity with the bilateral agreement, the facts in this proceeding do not justify such action. In the original case, no party opposed the award of the permit to SAA. Here, the Joint Intervenors are opposed to SAA's application and objected to the denial of their request to expand the issues to cover internal matters within South Africa.

Section 801 of the Act provides that copies of all applications for amendments of foreign air carrier permits

"shall be transmitted to the President by the Board before hearing thereon. . ." In this case the application which was transmitted to the President was limited to the single point of Johannesburg in South Africa. No application was transmitted to the President requesting a route from a point or points in South Africa. Under the circumstances, the amended permit will conform to SAA's application and will be limited to Johannesburg in South Africa. SAA's existing authority to serve a point or points in South Africa on its route to New York via Rio de Janeiro will of course remain unchanged.

SUMMARY OF FINDINGS AND CONCLUSIONS

On the basis of the foregoing considerations and all the facts of record, it is recommended that the Board find that:

1. It is in the public interest to amend the foreign air carrier permit held by South African Airways to authorize it, for an indefinite period, to engage in foreign air transportation of persons, property, and mail between Johannesburg, South Africa, the intermediate points Sal Island and/or Las Palmas, and the terminal point New York, New York.

2. The applicant is substantially owned and effectively controlled by citizens of the Government of South Africa and is fit, willing and able to properly perform the foreign air transportation proposed in its application and to conform to the provisions of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and requirements of the Board thereunder.

3. The applicant is in compliance with Titles II and VII of the Civil Rights Act of 1964, and sections 404(b)

and 411 of the Federal Aviation Act of 1958, as amended.

4. The public interest requires that the exercise of the privileges granted by the aforesaid permit shall be subject to the terms, conditions and limitations contained in the accompanying order and the form of permit attached hereto.

A proposed order and permit are attached.

/s/ ROSS I. NEWMANN
Ross I. Newmann
Administrative Law Judge

May 14, 1973
Attachments

Order 73-10-2

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 5th day of September, 1973

Application of: SOUTH AFRICAN AIRWAYS for an amended foreign air carrier permit pursuant to Section 402 of the Federal Aviation Act of 1958	**Docket 24944**

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision;

IT IS ORDERED:

1. That an amended foreign air carrier permit in the form attached hereto be issued to South African Airways;

2. That said permit shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and shall be effective upon the effective date of this order;

3. That, except to the extent granted, the application of South African Airways, and all other requests herein, be and they hereby are denied;

4. That this order shall become effective upon the date of its approval by the President of the United States.

By the Civil Aeronautics Board:

(SEAL)
THE WHITE HOUSE
APPROVED:
RICHARD NIXON
September 28, 1973

EDWIN Z. HOLLAND
Secretary

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

- - - - - - - - - - - - -

PERMIT TO FOREIGN AIR CARRIER
(as amended)

- - - - - - - - - - - - -

SOUTH AFRICAN AIRWAYS

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

1. Between a point or points in the Republic of South Africa, the intermediate point Rio de Janeiro, Brazil, and the terminal point New York, New York.

2. Between Johannesburg, South Africa, the intermediate points Sal Island and Las Palmas, and the terminal point New York, New York.

The holder hereof shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the Republic of South Africa for South African international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the Republic of South Africa shall be parties.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The holder shall keep on deposit with the Board a signed counterpart of C.A.B. Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in Agreement C.A.B. 18900, and unless there is on file with the Docket Section of the Board

a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

The holder may not, without prior Board approval, perform charter transportation between New York, on the one hand, and Las Palmas, on the other hand: *Provided, however,* That this condition shall not prevent the holder from serving Las Palmas on charter flights operated between New York and Johannesburg. Applications for such authority shall conform to the procedures, to the extent applicable, for issuance of "Statements of Authorization" under Part 212 of the Board's Economic Regulations, or any amendments or modifications of such Regulation.

The exercise of the privileges granted hereby shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be effective on September 28, 1973. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the route hereby authorized from the routes which may be operated by airlines designated by the Government of the Republic of South Africa, or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the Republic of South Africa in lieu of the holder hereof, or (3) upon the ter-

mination or expiration of the Air Transport Agreement between the Government of the United States and the Government of the Republic of South Africa, effective, May 23, 1947, as amended by exchange of notes, effective May 23, 1947, and June 28, 1968: *Provided, however,* That if prior to the occurrence of the event specified in clause (3) of this paragraph, the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and the Republic of South Africa are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 5th day of September, 1973.

EDWIN Z. HOLLAND
Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on September 28, 1973,
in Order 73-10-2.

No. 75-658

Supreme Court, U. S.
FILED
JUN 28 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES COLES DIGGS,
ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 516 F.2d 1248. The opinion of the Civil Aeronautics Board amending a foreign air carrier permit (Pet. App. 4a-9a), the Presidential approval of that amendment (Pet. App. 27a), the amended permit (Pet. App. 28a-31a), and the recommended decision of the Administrative Law Judge (Pet. App. 10a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1975. The petition for a writ of certiorari was filed on November 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 1006(a) of the Federal Aviation Act of 1958, 72 Stat. 795, as amended, 49 U.S.C. 1486(a), which provides that "any order in respect of any foreign air carrier subject to the approval of the President" shall not be reviewed by a petition for review in the court of appeals, precludes review in the court of appeals in this case.

STATEMENT

The governments of the United States and the Republic of South Africa entered into a bilateral agreement providing that airlines of each country may operate international air service between the two countries. 61 Stat. 3057. The Republic of South Africa designated South African Airways ("SAA"), an air carrier of the Republic of South Africa, to operate such a route. In 1968 SAA was authorized to fly between New York and Johannesburg via Rio de Janeiro pursuant to that bilateral agreement.

SAA submitted an application to the Civil Aeronautics Board in 1972 seeking to amend its permit to enable SAA to operate a shorter route between Johannesburg and New York via the Canary or Cape Verde Islands. Several members of the United States House of Representatives and associations of black United States citizens, the petitioners in this case, intervened before the Board and requested that hearings be held to examine allegations that SAA engages in racial discrimination. The Administrative Law Judge sustained that request in part,[1] and hearings were held with respect to some of SAA's practices, including its policies and practices regarding employment in this country, international flights and operation

[1]Among other matters, the Administrative Law Judge directed that the hearings would embrace SAA's compliance with the Civil Rights Act of 1964 and the anti-discrimination provisions of the Federal Aviation Act (49 U.S.C. 1374).

of the Johannesburg Airport. However, the Administrative Law Judge concluded that petitioners' allegations that SAA discriminates on domestic "continuation" flights within the Republic of South Africa were beyond the scope of the proceeding, and he declined to allow petitioners to introduce evidence with respect to those allegations.

The Administrative Law Judge found "that SAA does not discriminate racially * * * in any of the services or facilities it employs in foreign air transportation" (Pet. App. 19a) and recommended that the application be granted. The Board considered exceptions to the Administrative Law Judge's recommendations and found that SAA does not discriminate in international flights and facilities (Pet. App. 7a, 8a and n. 6). The Board concluded that discrimination on flights wholly within South Africa should not be considered.[2] The Board said that "however deeply the Board may deplore the racial policies and practices" of SAA (Pet. App. 8a), it would not convert the proceeding into an examination of South African domestic policy. To do so, the Board reasoned, would improperly inject the Board into "complex and delicate diplomatic questions," requiring the agency "to pass judgment on the internal policies of a foreign government" (*ibid.*).

The Board submitted its proposed order to the President for approval pursuant to Section 801 of the Aviation Act,

[2]The Board's finding with respect to the absence of discrimination on SAA's "facilities and accessorial services" (Pet. App. 7a) refers only to international matters. The phrase was immediately preceded by a finding as to "international flights" and the paragraph itself concluded with a finding as to "the international section" of the Johannesburg airport. Petitioners' assertion that the Board found that SAA does not discriminate on flights within South Africa without entertaining their evidence in that regard (Pet. 6-8, 16-17, 19 n. 8) is inaccurate.

49 U.S.C. 1461, and the President approved that order (Pet. App. 27a). SAA has operated weekly flights over that route for more than two years.

Petitioners filed a petition in the Court of Appeals for the District of Columbia Circuit seeking review of the amendments to SAA's certificate. That court dismissed the petition without reaching the merits, relying on Section 1006(a) of the Aviation Act, 49 U.S.C. 1486(a), which precludes judicial review of "any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act * * *." The court of appeals wrote (Pet. App. 3a): "We hold that the clear and unambiguous language in Sections 1006(a), 101(19), and 101(21) (c) of the Act deprives us of jurisdiction to review the challenged order."

ARGUMENT

Section 1006(a) expressly precludes review in the court of appeals of any order with respect to a foreign air carrier that is subject to approval by the President. It is undisputed that SAA is a foreign air carrier and that the order in question required and received Presidential approval.

This case does not present an occasion to resolve the apparently conflicting views in the courts of appeals concerning the prohibition of judicial review announced in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103. *Waterman* involved an application by a United States carrier to engage in international air transportation. Such orders also require Presidential approval, but Section 1006(a), which is addressed only to foreign air carriers, does not affect judicial review of those orders. On the basis of considerations bearing on the Executive Branch's prerogatives in foreign affairs, this Court concluded in *Waterman* that orders with respect to domestic carriers are not reviewable.

The court of appeals' decisions cited by petitioners (Pet. 11-14) create exceptions to the *Waterman* rule and allow review of certain types of orders involving domestic carriers. Those decisions do not suggest that a court could create an exception to the express statutory prohibition of judicial review of foreign carrier orders. On the contrary, courts without exception have held that the courts of appeals lack jurisdiction to review foreign carrier orders. *British Overseas Airways Corp.* v. *Civil Aeronautics Board*, 304 F.2d 952, 952-953 (C.A.D.C.); *Dan-Air Services, Ltd.* v. *Civil Aeronautics Board*, 475 F.2d 408, 411-412 (C.A.D.C.). As the court explained in *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 392 F.2d 483 (C.A.D.C.), judicially created glosses upon the judicially created *Waterman* rule are irrelevant to the meaning of the rule created by Congress in Section 1006(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-658

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Petitioners.

v.

CIVIL AERONAUTICS BOARD
and
SOUTH AFRICAN AIRWAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SOUTH AFRICAN AIRWAYS

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SOUTH AFRICAN AIRWAYS

Respondent South African Airways respectfully submits this brief in opposition to the petition herein.

STATUTES INVOLVED

In addition to the statutory provisions listed by petitioners, Section 1102 of the Federal Aviation Act, 49 U.S.C. § 1502 (1970), is also relevant:

"In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . .."

QUESTIONS PRESENTED

1. Does Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. §1486(a), which permits appeal of all Civil Aeronautics Board orders except any orders in respect of any foreign air carrier subject to the approval of the President, expressly preclude appellate review of an order by the Board, approved by the President, granting South African Airways a foreign air carrier permit?

2. If not, is the Court of Appeals' decision plainly and readily sustainable on other grounds, including lack of standing of petitioners to bring the action and the manifest correctness of the Board's and the President's decision on the merits?

STATEMENT

By a diplomatic Agreement Relating to Air Transport Service, signed at Cape Town, May 23, 1947, 61 Stat. 3057, T.I.A.S. No. 1591, 66 U.N.T.S. 233, as amended, Nov. 2, 1953, [1953] 4 U.S.T. 2205, T.I.A.S. No. 2870, and June 28, 1968, T.I.A.S. No. 6512 (the "Bilateral Agreement"), South Africa and the United States reciprocally agreed to permit international air service between the two countries by an air carrier of each country. Pursuant to this Agreement South African Airways (SAA) flies into and from New York, just as, pursuant to the same Agreement, Pan American also flies between New York and Johannesburg.

The original Agreement designated specific routes for a United States air carrier, but provided that flights by the South African carrier should be "over such routes as may be determined at a later date." Pan American was promptly designated as the United States carrier, and promptly applied for and received the necessary authorization from the South African authorities. Pan American has conducted regular flights between New York and South Africa since 1947.

In 1967 South Africa sought to implement its right under the Bilateral Agreement to add a South African carrier to participate in air transportation between South Africa and the United States. After a careful and thorough review,[1] the State Department agreed to South Africa's proposal. The 1968 amendment to the Bilateral Agreement designated two routes for a South African carrier. The first such route was described as "South Africa via points in Africa south of the Equator, the Cape Verde Islands, the Canary Islands, Spain and Portugal to New York." The second route was described as "South Africa via points in Africa south of the Equator and South America to New York."

South Africa, pursuant to Article II(A)(1) of the Bilateral Agreement, then designated SAA as its flag carrier to exercise the rights granted to South Africa by the Bilateral Agreement as amended. SAA applied to the Civil Aeronautics Board (CAB), pursuant to Section 402 of the Federal Aviation Act, 49 U.S.C. § 1372, for a foreign air carrier permit to conduct flights over the second route described in the 1968 amendment to the Bilateral Agreement. After public hearing the Board granted such authority. Its order was referred to the President of the United States as required by

[1] See Statement of Frank Loy, Deputy Assistant Secretary of State for Transportation and Communication, in South Africa and United States Foreign Policy, Hearings Before the Subcommittee on Africa of the House Committee on Foreign Affairs 17-26 (91st Cong., 1st Sess. 1969) (hereinafter "Hearings").

Section 801 of the Act, 49 U.S.C. § 1461, and was approved by him on November 7, 1968. Pursuant to that authority, SAA has since February 1969 regularly operated one round-trip flight per week between Johannesburg and New York via Rio de Janeiro.

The proceeding from which the present petition derives was instituted by SAA in 1972 to obtain authorization for flights over the first route designated by the 1968 amendment to the Bilateral Agreement: a route between Johannesburg and New York via the Cape Verde or Canary Islands. The application involved no change in either the origin or destination points of SAA's flights (New York and Johannesburg), but merely a change in the route and intermediate stops between those points. The sole purpose of the application was to allow SAA to fly a route more than 1,200 miles less and two to three flying hours shorter than its then-existing route, with resulting substantial economies and improvements in the service it could render its passengers.

After an administrative proceeding, in which the petitioners intervened and which included a public hearing, the Administrative Law Judge issued a recommended decision to grant the new route (Pet. 10a). The Judge made findings meeting the requirements of Section 402(b) of the Act that SAA be "fit, willing, and able to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest" (Pet. 25a).

On the basis of evidence submitted at the hearing, the Administrative Law Judge found that SAA does not practice racial discrimination in the United States or in its services in international air transportation and, therefore, that SAA does not discriminate in violation of Section 404(b) of the Act, 49 U.S.C. § 1374(b), or Titles II and VII of the

Civil Rights Act of 1964, or engage in deceptive practices under Section 411 of the Act, 49 U.S.C. § 1381 (Pet. 19a-21a).

The petitioners excepted to the recommended decision on the ground that the Administrative Law Judge had improperly excluded evidence concerning racial practices (a) on SAA's intra-South Africa flights; (b) at domestic airport facilities in South Africa (as distinguished from the international portion of Jan Smuts Airport, Johannesburg, where SAA's international flights originate and terminate);[2] and (c) at miscellaneous intra-South Africa facilities not operated by SAA but which American visitors to South Africa might wish to utilize.

The Board adopted the Administrative Law Judge's recommendation (Pet. 4a). The Board concluded that the evidence supported the Judge's finding that the transportation for which SAA sought authority would be performed in conformity with the Act and in the public interest. Specifically, the Board noted that SAA "does not discriminate on the basis of race on any of its international flights" and "it makes its [international] facilities and accessorial services available on a non-discriminatory basis" (Pet. 7a).

Rejecting the petitioners' contention, the Board found that inquiry by it into the operations of a foreign carrier in its home country, and into the internal policies of a foreign government, "would necessarily inject the Board into the complex and delicate diplomatic questions affecting relations between the United States and a friendly foreign nation" (Pet. 8a). Thus the Board determined that it "would neither be practicable nor redound to the benefit of the public interest" to expand the scope of inquiry in a permit

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[2] It is, of course, general if not universal practice for airports serving other countries to contain both international sections and domestic sections, and in the latter for the law of the local sovereign to be fully applicable.

proceeding beyond "an examination of those international services specifically authorized in the applicant's amended permit" *(id.)*.[3]

The President of the United States, pursuant to Section 801 of the Act, approved the Board's order on September 28, 1973. SAA instituted service on the newly authorized route on November 2, 1973, and since that date has operated one round-trip weekly flight on the new route, as well as continuing its pre-existing schedule on the old route.

Petitioners purported to appeal from the President's decision to the Court of Appeals for the District of Columbia Circuit. Respondents CAB and SAA both moved to dismiss the appeal for want of jurisdiction. The Court referred these motions to the panel assigned to hear the case on the merits. After full briefing and argument on the merits, the Court issued its unanimous *per curiam* opinion granting respondents' motions to dismiss (Pet. 1a-3a). From that decision petitioners seek certiorari.

[3] Petitioners appear to claim (Pet. 6-7) that the Board relied on findings by the Administrative Law Judge of non-discrimination in SAA's *internal* flights and facilities. To the contrary, the Board made it wholly clear that it regarded that issue as irrelevant and declined to address it (Pet. 7a-8a).

ARGUMENT

I.

THE DECISION BELOW IS MANIFESTLY CORRECT AND PRESENTS NO QUESTION WARRANTING CERTIORARI.

Section 1006(a) of the Act, 49 U.S.C. § 1486(a), provides that all CAB orders are subject to review in the courts of appeals, *"except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title."* (Emphasis added.) The Board's order here under attack was a recommendation to the President, pursuant to Section 801 of the Act—which is "Section 1461 of this title"—that SAA's application for a foreign air carrier permit be approved. The wholly explicit language of Section 1006(a) requires the result reached below.

The Court of Appeals may not exercise jurisdiction where an act of Congress clearly precludes such jurisdiction. *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); see Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 701(a). Every court which has ruled on the matter has concluded that the express statutory bar of Section 1006(a) deprives the courts of appeals of all authority to review presidentially approved orders in a foreign-air-carrier-permit proceeding, no matter what grounds are urged to support the challenge. *Dan-Air Services, Ltd.*, v. *CAB*, 475 F.2d 408 (D.C. Cir. 1973); *British Overseas Airways Corp.* v. *CAB*, 304 F.2d 952 (D.C. Cir. 1962); see *Pan American World Airways, Inc.*, v.

CAB, 392 F.2d 483 (D.C. Cir. 1968).[4] The law is uniform; there is no conflict among circuits; and the case law is plainly correct.

Petitioners attempt to avoid these simple facts by confusing the issue here with that presented by *Chicago & Southern Airlines, Inc.*, v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948), and its progeny. That line of authority deals, not with the express statutory bar against appeals from decisions in foreign-air-carrier-permit proceedings, but rather with the quite different question of judicial reviewability of permits issued to *domestic* air carriers to engage in international air transportation. The statutory bar of Section 1006(a) does not embrace domestic-air-carrier-permit proceedings. Nonetheless, in *Waterman* this Court held that considerations of foreign policy and separation of powers required that presidentially approved orders in these domestic-carrier proceedings be immune from judicial review.

While this Court has never in any subsequent case limited its holding in *Waterman*, two courts of appeals have held that the *Waterman* doctrine does not preclude such review in cases where the Board's statutory authority to enter its order is challenged. *Pan American World Airways, Inc.*, v. *CAB*, 380 F.2d 770 (2d Cir. 1967), *aff'd by an*

[4] In *Pan American* the court, while deciding the case on the merits and thus avoiding disposition of the jurisdictional issue, included in its opinion a thorough analysis of that issue which stressed the formidable obstacles to review and made it clear how that issue would have been decided had decision been necessary. 392 F.2d at 490-93. The court's election not to decide the jurisdictional issue stemmed from the fact that it had before it consolidated actions representing not only a purported direct appeal from the Board's order, but also an appeal from a district-court decision denying mandamus in an action originally brought there. Thus a decision based on the bar presented by Section 1006(a) to direct review of Board orders in a court of appeals would not have avoided the merits, which the court found in any event relatively simple.

equally divided court sub nom. World Airways, Inc., v. *Pan American World Airways, Inc.*, 391 U.S. 461 (1968); *American Airlines, Inc.*, v. *CAB*, 348 F.2d 349 (D.C. Cir. 1965); *Alaska Airlines, Inc.*, v. *Pan American World Airways, Inc.*, 321 F.2d 394 (D.C. Cir. 1963). Petitioners' argument is that these cases somehow cast doubt on or are in conflict with the decisions denying review in the foreign-air-carrier situation discussed above.

The contention is wholly without merit. None of the cases on which petitioners rely involved a foreign air carrier or the express statutory bar which is conclusive here; and, petitioners' contentions notwithstanding, there is nothing in any of the opinions which suggests that the rule they evolved had or could have any application to foreign air carriers. If there is any confusion or conflict in the *Waterman* doctrine and its interpretation by appellate courts, the present case, which does not involve the *Waterman* doctrine at all, is not the proper case to resolve it.[5]

Petitioners assume rather than argue that the test for reviewability should be the same regardless of whether a foreign or a domestic carrier is involved. But there are critical differences between the two situations; Section 1006(a) itself is of course a clear manifestation of Congress' perception of the differences. Treaties and international comity must be considered when a foreign carrier is involved. Judicial interference in the granting of such a permit may, and indeed would in this case,[6] result in the

[5] The opinion below did not even cite *Waterman*, except in a footnote pointing out its inapplicability (Pet. 3a, n.1).

[6] Rejection of SAA's application for a permit on the basis of an examination of internal South African laws and practices, as petitioners urge, would hardly be consistent with the Bilateral Agreement, by which the United States and South Africa agreed to the reciprocal entry of air carriers of each country into the territory of the other. The Bilateral Agreement requires observance of the laws of each contracting party within its own territory (Article V(B)). The action

breach of international agreements by the United States. Judicial review in this area would undoubtedly cause embarrassment to the Executive and interference with the nation's foreign policy.[7]

Interference with the reciprocal air-traffic arrangements between this country and any other nation would surely lead to retaliatory action by the latter, against our air carriers or otherwise, and if based on the considerations urged by petitioners would furnish a mischievous precedent for examination in the courts of one country of the domestic policies and practices of another in violation of the act-of-state doctrine, see *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *Underhill* v. *Hernandez*, 168 U.S. 250, 252-54 (1897). And such interference could not be confined to South Africa; air travel to many other countries would raise similar problems if internal conditions in countries of destination had to be examined by the Board.[8] These are merely a few of the factors which make foreign-air-carrier-permit questions sharply different from questions involving domestic carriers and preclude petitioners' attempt to regard them as fungible for purposes of judicial reviewability.[9]

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petitioners seek would also violate Article I of the Convention Respecting International Civil Aviation (The Chicago Convention), December 7, 1944, 61 Stat. 1180 15 U.N.T.S. 295, which recognizes the "complete and exclusive sovereignty" of every nation within its territory and the air space above it (Article I); see Holmes v. Laird, 459 F.2d 1211, 1216 (1972). Section 1102 of the Act, 49 U.S.C. § 1502, pp. 1-2, *supra*, enjoins the Board to act consistently with international obligations.

[7] See Loy, Hearings, n. 1 *supra*, for a detailed demonstration that the foreign-policy decision to confirm and to implement reciprocal air-traffic rights with South Africa was carefully considered and made with full consciousness of the arguments that could be urged against it, including the very arguments petitioners seek to raise in this proceeding.

[8] Loy, Hearings, n. 1 *supra*, at 25-26.

[9] Petitioners to the contrary, this distinction was recognized in the legislative history of the Act. "There is another power that the

Petitioners appear to argue (Pet. 15-16) that Section 1006(a) was written in light of judicial views current in 1938 as to reviewability; that this Court's decision in *Baker* v. *Carr*, 369 U.S. 186 (1962), has changed those views and broadened reviewability; and that Section 1006(a) should therefore be "interpreted" in the light of that current doctrine. The suggestion is startling. *Baker* v. *Carr*, like *Waterman*, dealt with *judicially self-imposed* limitations in the absence of any statutory bar; nothing in that case or in any other case denies the power of Congress to limit reviewability in the courts of appeals[10] simply because a justiciable question would be present had Congress not so acted. To the contrary, it is wholly clear that the jurisdiction of courts of appeals depends entirely on statute law; see cases cited at p. 7, *supra*. Petitioners' argument is properly addressed to Congress, not to this Court.

Moreover, *Baker* v. *Carr* itself declares criteria for non-justiciability—including "commitment of the issue to a coordinate political department," "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," 369 U.S. at 217—which strongly suggest that the issue here would be held nonjusticiable even in the absence of a statutory bar. On at least two occasions the Executive has specifically determined not to make the in-

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President has, and that is in connection with the issuance of permits to a foreign flag air line to operate to the United States. That is purely international and national defense, and no question has been raised with respect to giving the President any such power as that." Hearings on S. 3760, To Create a Civil Aeronautics Authority, Before the Senate Commerce Committee, 75th Cong., 3d Sess. 7 (1938). The legislative history cited at Pet. 15 contains nothing to the contrary.

[10] As the court below pointed out (Pet. 3a), the question whether petitioners can have their claims adjudicated in an original district-court action is not presented by this case.

ternal affairs of South Africa the basis on which a foreign air carrier permit is granted to or withheld from its flag carrier. The first such occasion was when the Bilateral Agreement here in question was reviewed and implemented in 1968;[11] the second was in 1973, when the President, being fully apprised of petitioners' offer of proof and the Board's rejection thereof, determined to grant the permit. The President obviously shared the view of the Board and the State Department that petitioners' evidence was irrelevant to whether the permit should be granted. Judicial second-guessing of the President in the situation presented here would intrude upon the foreign-relations power, demonstrate a lack of respect due to the presidency, and create grave embarrassment in our relations with a foreign country with whom our relations have been recognized to be particularly sensitive.[12]

II.

PETITIONERS LACK STANDING TO BRING THIS ACTION.

A further reason why the writ should not be granted is that the decision below is plainly sustainable on a ground not reached by the Court of Appeals: petitioners have no "substantial interest" in the subject matter of the litigation, as required for judicial review of CAB orders by Section 1006(a) of the Act, 49 U.S.C. § 1486(a), and indeed lack Ar-

[11] When questioned by Congressman Diggs, petitioner herein, as to whether the Bilateral Agreement should have been implemented in light of South Africa's racial policies which petitioners seek to litigate here, the responsible State Department official testified: "before we signed the amendment to the agreement in 1968 we considered in the Department with some care the very kinds of questions that you are raising," and explained in detail why notwithstanding those questions the foreign-policy decision was to proceed with reciprocal air rights. Loy, Hearings, n.1 *supra*, at 21-26.

[12] David Newsom, Assistant Secretary for African Affairs, Department of State, "Southern Africa: Constant Themes in U.S. Policy," LXVII Dep't. of State Bull., No. 1726, at 120 (July 24, 1972).

ticle III constitutional standing. *E.g., Warth* v. *Seldin*, 43 U.S.L.W. 4906 (U.S. June 25, 1975); *Schlesinger* v. *Reservists Committee To Stop the War*, 418 U.S. 208 (1974); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Petitioners have never alleged that any individual petitioner or any member of the petitioner organizations has been injured or will be injured by any of the internal South African practices they seek to challenge, let alone by the Board's decision here at issue.[13] They have alleged merely interest in racial discrimination in general[14] and political opposition to the South African government; these are not enough.

Those petitioners who are members of Congress have likewise alleged only a generalized "interest in a problem," *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739, rather than any of the particularized types of responsibilities and concrete injuries which have been held required in those few cases in which members of Congress have been held to possess standing for reasons connected with their legislative duties.[15]

[13] The Board's decision merely allowed SAA to add *a new intermediate route* to its pre-existing service between the same points of origin and destination; see p. 4, *supra*. Even if a petitioner were harmed by (voluntarily) flying to South Africa and subjecting himself to internal conditions there, he is hardly harmed by the fact that some flights now go to Johannesburg via the Cape Verde Islands rather than via Rio de Janeiro.

[14] They describe themselves merely as having "particular concerns about possible United States involvement in policies of racial discrimination affecting American citizens" (Pet. 5, n.1).

[15] Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973). In each of these cases specific, particularized responsibilities of the plaintiff members of Congress were held to give them standing. Where, as here, such responsibilities are absent, standing is denied to members of Congress. Public Citizen v. Sampson, 515 F.2d 1018 (D.C. Cir. 1975), *aff'g* 379 F. Supp. 662 (D.D.C. 1974); Stokes v. General Services Administration, 515 F.2d 1018 (D.C. Cir. 1975); Holtzman v. Schlesinger, 484 F. 2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

III.

PETITIONERS' STATUTORY AND CONSTITUTIONAL ARGUMENTS AGAINST THE BOARD'S ORDER ARE WITHOUT SUBSTANCE.

Even if this Court should consider the question whether foreign-air-carrier-permit presidential decisions are subject to judicial review as worthy of its attention, an appropriate case for that purpose would be one where petitioners raised substantial questions that the Board and the President had acted beyond the scope of their statutory authority or in violation of the Constitution. This is plainly not such a case. Petitioners' arguments on the merits border on the frivolous.[16]

Petitioners "do not question in this proceeding the power of the President to authorize the route in question once an adequate record has been created by the Board" (Pet. 17). They claim only that the Board and the President erred in failing to consider the evidence they offered, which dealt with internal conditions in South Africa. Such a claim hardly rises to the level of excess of statutory or constitutional authority.

Petitioners' statutory claim is that under Section 402(b) of the Act, 49 U.S.C. § 1372(b), the issuance of a permit must be found to be in the "public interest," and that this provision required the Board to accept evidence concerning internal conditions in South Africa. But this Court has held that administrative agencies should not inquire into the internal affairs of a foreign country absent express congressional direction to do so, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), and that legislation applies

[16] We note that the Court of Appeals required full briefing and argument on the merits before granting respondents' motion to dismiss.

only within the territorial jurisdiction of the United States unless Congress clearly indicates an intent to the contrary, *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *Foley Bros., Inc.*, v. *Filardo*, 336 U.S. 281, 285 (1949); *Blackmer* v. *United States*, 284 U.S. 421 (1932); *Restatement (2d), Foreign Relations Law of the United States* § 38 (1965). Such inquiries "would inevitably lead to embarrassment in foreign affairs" and would raise "questions of such international import . . . as to invite retaliatory action from other nations," *McCulloch* v. *Sociedad Nacional, supra*, 372 U.S. at 19, 21 — language particularly applicable here. Thus the Board had no jurisdiction to inquire into the matters petitioners sought to raise and, even if it had, properly determined not to exercise such jurisdiction.[17]

Petitioners' constitutional claim is that alleged racial discrimination in purely internal facilities within South Africa is "state action" by the CAB in violation of the Fifth Amendment, since the Board has granted SAA permission to fly between Johannesburg and New York. The claim is wholly without merit in view of this Court's decisions in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), and *Columbia Broadcasting System, Inc.*, v. *Democratic Nat'l Committee*, 412 U.S. 94 (1973). Here the CAB does not even regulate the internal South African facilities with which petitioners are concerned; as the Board noted in its decision, its regulatory power is limited to the international transportation which is completed when the international flights end (Pet. 7a-8a).

[17] The Board's action was consistent with its policy in analogous situations. See Pan American World Airways, Inc., v. CAB, 392 F.2d 483 (D.C. Cir. 1968). Here the Board's decision was further warranted by Section 1102 of the Federal Aviation Act (pp. 1-2, *supra*), requiring the Board to exercise its functions in accordance with treaty obligations of the United States.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 75-658

IN THE

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October Term, 1975

CHARLES COLES DIGGS, *et al.*,
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and

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners submit this Reply Brief in support of their petition for a Writ of Certiorari.

The Brief in Opposition of Respondent Civil Aeronautics Board (CAB) states, "[t]he Board concluded that discrimination on flights within South Africa should not be considered . . . ." and "[p]etitioners' assertion that the Board found that SAA does

not discriminate on flights within South Africa without entertaining their evidence in that regard . . . is inaccurate." (Brief of Respondent CAB 3 and n. 2).

Respondent's statements notwithstanding, the record before the Court clearly establishes that findings on the issue of non-discrimination on SAA's continuation flights in South Africa and at SAA's facilities used by these flights were made by the Board and petitioners' proffer of evidence on these issues was rejected. The Administrative Law Judge (ALJ) in this case took evidence from respondent SAA's witness on the absence of discrimination against Americans on SAA's internal connecting flights in South Africa and at facilities utilized by these flights. Further, he made findings of non-discrimination against Americans on these matters. (Pet. 6). The Board in its opinion specifically noted that it "adopts as its own the *findings,* conclusions, and recommendations of the Administrative Law Judge. . ." (Emphasis supplied) (Pet. 6a). The ALJ's opinion was appended to the Board's opinion, (Pet. 6a), and submitted to the President. From the outset of this case petitioners sought repeatedly, but without success, to introduce evidence on these questions. (Pet. 5-8).

The Board's acceptance of SAA's evidence and subsequent findings on the issues of discrimination on SAA's internal connecting flights and facilities used by these flights in South Africa – issues on which petitioners attempted without success to introduce evidence – raises a clear question of procedural due process under the rule enunciated in *Northeast Airlines, Inc. v. CAB,* 345 F.2d 484 (1st Cir. 1965). The opinion of Chief Judge Aldrich in the *Northeast* case, in which Judges Burger and Maris joined, holds that basic principles of due process mandate that parties contesting evidence submitted in a CAB proceeding be given an opportunity to submit rebuttal evidence even if the material in dispute is not relevant to the challenged Board decision. The Court held:

> "It is to us crystal clear that as soon as it (the Board) elected to look at such matters it could not pick and choose, at least to the extent of denying an objecting party the rights guaranteed . . . to rebut not only those matters it looked to, but also the inferences which were sought to be drawn therefrom. Due process could permit no less." *Northeast Airlines, Inc. v. CAB, supra,* 345 F.2d at 486.[1]

The Brief of Respondent CAB avoids the procedural due process issue of this case, first by ignoring the fact that SAA submitted evidence of non-discrimination on its internal connecting flights and services in South Africa, and then by erroneously stating that no findings were made on these subjects by the ALJ and the Board. The Brief of Respondent SAA fails to address this essential element of the case.

II

Respondent SAA's assertion that the criteria for non-justiciability set out in *Baker v. Carr,* 369 U.S. 186 (1962), would bar review of the Board's action recommending SAA's route to the President is simply incorrect. The

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[1] The conduct of the ALJ and the Board in the instant case is, if anything, more egregious than the actions declared unlawful in Northeast, since here the ultimate issue at stake involves racial discrimination rather than commercial considerations.

final authority of the President is not at issue in this case; it is the illegal actions of the Board which petitioners contest. A court order remanding this case for the introduction of petitioners' rebuttal evidence would neither create a risk of embarrassment to the United States, nor would it express a lack of respect for another branch of government, nor infringe upon a commitment made to another political department. Rather, it would merely assure the President's ability to reach a decision on SAA's permit application with a full and accurate statement of facts before him.[2] Once presented with a proper record, it is conceivable that the President might conclude that foreign affairs considerations required the issuance of SAA's route despite the presence of racial discrimination. Should the President approve a correctly processed Board recommendation, the criteria of *Baker v. Carr* might pose substantial barriers to judicial review.[3]

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[2] The fact that the President may not have been influenced by erroneous statements of non-discrimination or that evidence of general discrimination in South Africa may have been presented to Congress or the Executive Branch in the past is immaterial to this case. Petitioners do not ask this Court to decide whether evidence of discrimination would or would not influence the President's determination of SAA's application. Rather, the Court's responsibility is to assure that the procedures by which a record is created for the President comport with due process.

[3] In any case, even the ultimate judicial relief required in this case under the Constitution should petitioners prevail might give no offense to Executive prerogative in the area of foreign affairs. For example, petitioners have suggested below the possible requirement of notice to black American passengers on SAA flights that they will face racial discrimination on continuation flights and at SAA facilities in South Africa.

III

Although both respondents refer to the judicial authorities which note a distinction between foreign and domestic carriers in assessing reviewability, neither examines closely the cases cited by petitioners which suggest that this distinction is immaterial if an invalid Board order is at issue. *American Airlines, Inc. v. CAB*, 348 F.2d 349 (D.C.Cir. 1965); *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (2nd Cir. 1967), *aff'd by an equally divided Court, World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968). See discussion in Petition at 10-13. In these cases, Judges Burger and Hays found it unnecessary to distinguish between foreign and domestic carriers when allegations of unauthorized Board action had been made. Just as Judge Burger concluded in *American Airlines* that *Waterman* does not govern a situation where the action of the Board exceeds its statutory power, since in these circumstances no *valid* order can be submitted to the President, so petitioners submit that § 1006 does not bar review of the constitutionally defective Board action in the instant case.

IV

Respondent SAA suggests that petitioners lack standing in this case. In fact, the matter of standing was fully briefed below and petitioners presented an unbroken line of authority holding that successful intervenors in CAB proceedings have standing to pursue their statutory rights as petitioners in the courts of appeals under the Act. See, *e.g., Pillai v. CAB*, 158 U.S.App.D.C. 239, 485 F.2d 1018 (D.C. Cir. 1973); *Aviation Consumers Action Project v. Civil Aeronautics Board*, ____ F.2d ____, 12 (CCH) AVI

L.R. ¶ 17.754 (D.C.Cir. Jan. 31, 1973); *Moss v. CAB*, 139 U.S.App.D.C. 150, 430 F.2d 891 (D.C.Cir. 1970); *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); *Western Airlines, Inc. v. CAB*, 190 F.2d 340 (9th Cir. 1951). Moreover, to suggest, as does respondent SAA, that petitioners should be denied standing for failing to meet an "injury in fact" test is untenable not only because that standard was not invoked against petitioners when they intervened before the Board, but because such a suggestion lacks case law support.[4]

V

In addition to the question of procedural due process, petitioners have suggested that two other issues are presented by the Board's actions. First, petitioners submit that the Board is under a statutory duty to accept evidence of racial discrimination against black Americans on SAA's continuation flights in South Africa bookable in the United States or at SAA facilities serving such flights.[5]

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[4] Petitioners have, of course, maintained that they could meet the "injury in fact" test for standing should it be required since not only do members of the Congressional Black Caucus have specific legislative responsibilities regarding South Africa, but members of the other intervenor organizations have either faced discrimination on SAA flights or at SAA facilities in South Africa or declined to patronize SAA because of its discriminatory policies. While petitioners maintain that they possess clear statutory standing under the Federal Aviation Act, it is relevant to note that should they be unable to obtain statutory review in this case due to the barrier of § 1006, they may, under respondent's reading of the "injury in fact" test, be barred from presenting their claims in an original action. In this event, any review of the issues petitioners seek to raise would be precluded.

[5] While petitioners obviously do not purport to argue the merits of their statutory violation claim in this reply brief, it should be noted (continued)

See statutory provisions cited in Petition at 5 and *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2nd Cir. 1956) and *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D.Ala.N.D. 1962). In contesting petitioners' statutory duty argument, respondent SAA cites a series of cases for the proposition that agencies should not inquire into the internal affairs of foreign countries. These cases are beside the point;[6] in this case the agency did in fact conduct an inquiry, but in so doing denied petitioners their basic rights to procedural due process.

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[5] (continued)
that the CAB routinely inquires into the internal safety records of foreign airlines and has frequently defined foreign transportation to incorporate continuation flights in commercial proceedings: *See, e.g.*, Agreement adopted by the Traffic Conferences of the International Air Transport Association relating to fare matters, CAB Order 72-10-1 at 4; and Canadian Colonial Airways, Inc., Investigation, 2 CAB 752, 754 (1941). Finally, the Board has on occasion required foreign airlines to provide information on their domestic schedules. In one such case, In the matter of the Schedules of KLM Royal Dutch Airlines, CAB Order 74-11-150, the Board, in language equally applicable to the instant case, found that the requirement of such information could have no adverse effect upon the foreign airlines until a final decision was issued by the President.

[6] The principal case relied upon by the Respondents for their position, McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963), is easily distinguishable from the case at bar. McCulloch involved the judgment that the National Labor Relations Act was intended by Congress to affect only American seamen. The NLRB does not routinely regulate foreign carriers, as does the CAB. Moreover, McCulloch involved neither the scope of a factual investigation nor threatened constitutional interests. These distinctions apply with equal force to other cases cited by the Respondent SAA in its discussion of the statutory violations in this proceeding. (Brief of Respondent SAA at 15).

Petitioners also suggest that the question of a constitutional violation under the Fifth Amendment will be presented should the President grant SAA's route permit after a full review of a record including petitioners' evidence of racial discrimination.[7] The principal authority relied upon by respondent SAA to oppose this argument, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), is readily distinguishable from the instant case. Contrary to the function of the state regulatory body in *Moose Lodge*, the CAB is under an explicit statutory obligation to make findings as to racial discrimination in assessing the public interest. Further, as discussed, *supra*, petitioners submit that the CAB's statutory responsibilities extend to SAA's continuation flights in South Africa bookable in the United States.

Even in the absence of extensive argument on the merits of petitioners' statutory and constitutional contentions, they may hardly be characterized as frivolous.

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[7] Until the President acts on a Board recommendation which comports with statutory requirements and procedural due process, no valid order is at issue in this case and consideration of a substantive Fifth Amendment violation is inappropriate.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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